

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1414

To be argued by
FEDERICO E. VIRELLA, JR.

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1414

UNITED STATES OF AMERICA,

Appellee,

—v.—

ERNEST MALIZIA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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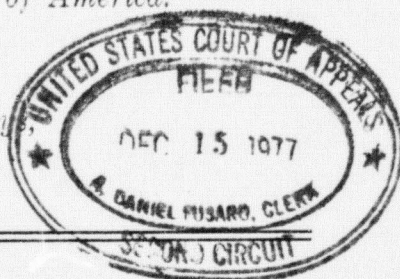


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FOR THE SECOND CIRCUIT

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—v.—

ERNEST MALIZIA,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Ernest Malizia appeals from a judgment of conviction entered on June 15, 1977, in the United States District Court for the Southern District of New York, after an eleven day trial before the Honorable Irving Ben Cooper, United States District Judge, and a jury.

Indictment 75 Cr. 687, filed on July 10, 1975, charged Malizia and eighteen other defendants with conspiracy to violate the Federal narcotics laws in violation of Title 21, United States Code, Section 846. The trial of Indictment 75 Cr. 687 occurred in October 1975. At the time Malizia was a fugitive. Malizia eventually was apprehended and his trial commenced on April 19, 1977. On May 3, 1977, the jury found Malizia guilty on the con-

spiracy count, the only count in which he was named as a defendant.*

On June 15, 1977, Judge Cooper sentenced Malizia to a term of fifteen years imprisonment to be followed by six years special parole and a committed \$25,000 fine. This sentence was consecutive to Malizia's other federal terms of imprisonment.** Malizia is currently incarcerated.

* The trial of some of Malizia's co-defendants in Indictment 75 Cr. 687—Joseph Magnano, Frank Pallatta, Anthony DeLutro, Anthony Soldano, Richard Bolella, John Gwynn, Frank Lucas, and William Chapman—occurred in October 1975 before Judge Cooper. The jury found Magnano, Pallatta, DeLutro, Soldano, Gwynn, Bolella, and Lucas guilty on various counts in which they were charged. The jury was unable to reach a verdict as to defendant Chapman who was subsequently murdered on March 13, 1976. The convictions were affirmed by this court. *United States v. Magnano*, 543 F.2d 431 (2d Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977); *United States v. Gwynn*, Dkt. No. 76-1011 (2d Cir. Feb. 10, 1977), *cert. denied*, U.S.L.W. . The defendants Macchiarola, Carbone, Tufaro, Ferraro, Margiasso, Joseph Malizia, and Rodriguez were, and to this date remain, fugitives from justice. Defendants Caravella and Harrison were severed on consent. Prior to the 1975 trial Cachoian pleaded guilty to Count Eleven, and on the second day of trial, defendant Rivera pleaded guilty to Count Twelve.

** On March 19, 1974, Judge Motley imposed a ten year term of imprisonment and a \$20,000 fine to be followed by three years special parole on Malizia upon his conviction on Indictment 74 Cr. 150, charging Malizia with distributing approximately 1,000 grams of cocaine hydrochloride. This Court affirmed that conviction. *United States v. Malizia*, 503 F.2d 578 (2d Cir. 1974), *cert. denied*, 420 U.S. 912 (1975). Shortly thereafter, Malizia and others escaped from the Federal House of Detention at West Street in New York City. On February 4, 1977, Malizia was apprehended in Miami, Florida. On May 5, 1977, Judge Henry F. Werker imposed five year sentences on Malizia upon his convictions on Indictment 74 Cr. 1018 charging him with the 1974 escape and bribery. These sentences were imposed concurrent with each other, but consecutive to Judge Motley's sentence. The sentence imposed by Judge Cooper was consecutive to Judge Motley's and Judge Werker's sentences.

Statement of Facts

A. The Government's Case

1. Introduction

The Government's evidence presented primarily through the testimony of Mario Perna and Anthony Verzino approximately 50 exhibits established that from early until July 10, 1975, Malizia and his co-conspirators participated in a massive conspiracy to distribute more than 150 pounds of heroin in the New York metropolitan area. Magnano, Pallatta, Bolella, DeLutro, Soldano, and others supplied the defendant Ernest Malizia and co-conspirators Mario Perna and Anthony Verzino with large amounts of heroin.* Malizia, Perna, and Verzino were the core members of the conspiracy who sold the heroin to numerous customers on an almost daily basis. Lucas, the partnership's largest customer, controlled his own large street level heroin organization and during the conspiracy purchased more than 100 pounds of heroin.

B. The Malizia-Perna Partnership Is Formed and Is Supplied Heroin by the Pallatta Organization.

In the early part of 1973 Mario Perna met with Malizia, who was then using the name of "Harry," at the Evergreen Bar in Brooklyn, New York. The two men agreed to return to the narcotics business and began to

* Judge Cooper described Malizia's role in this conspiracy as "a top rank operator of this horrifying scheme and its devastating results." (Sentencing Minutes, *United States v. Malizia*, 6/15/77, p. 47).

search for a supplier of heroin. (Tr. 55-61).^{*} The search ended when Malizia met and introduced Frank Pallatta to Perna as Frank "Bolot". Before this meeting, Malizia had told Perna that Pallatta had had prior narcotics deals with Malizia and that Pallatta owed him some favors. At the meeting Malizia asked Pallatta if he could obtain and supply heroin for them. Pallatta replied that he would have to consult his partners and that if he did get heroin it would be diluted. The three men agreed to meet that Sunday evening at the Raceway Diner in Yonkers. (Tr. 61-73).

The following Sunday night at the Raceway Diner, Pallatta agreed to sell Malizia and Perna two kilograms of heroin at \$25,000 per kilo on consignment to be paid within seven to ten days after delivery. Pallatta told Perna and Malizia that by diluting the heroin they could make four or five kilograms out of each kilogram purchased from Pallatta. The three men arranged to meet the next night. (Tr. 74-77).^{**}

On the following evening Pallatta met with Perna and Malizia and told them that two kilograms of heroin would be delivered by a person named "Skooch" ^{***} who would meet them that night at the Allerton Theater in the Bronx, and that they could have a week to ten days to pay for the heroin. Pallatta, Perna and Malizia agreed to meet again the following Sunday night. Thereafter,

^{*} "Tr." refers to the trial transcript; "GX" to Government's Exhibits; "App." to appellant's appendix on appeal; and "Br." to appellant's brief on appeal.

^{**} After this meeting Malizia and Perna rented an apartment on Sheridan Avenue in the Bronx which they used as a "stash" to store the expected heroin. Malizia brought some manita to dilute the heroin and scales and Perna supplied the plastic bags. (Tr. 78-81).

^{***} "Skooch" was the nickname for Frank Ferraro who was indicted in this case. He is currently a fugitive.

Malizia and Perna met Ferraro who gave Malizia and Perna two kilograms of heroin. (Tr. 82-88).

Malizia and Perna returned to the Sheridan Avenue apartment where they diluted a sample of the heroin Ferraro had delivered, and Perna tested its potency by having an addict named Flaco inject it. Satisfied with the quality of the heroin, Malizia and Perna unsuccessfully tried to sell the entire two kilograms to one buyer. When they were unsuccessful in making the bulk sale they sold the heroin in one-eighth and one-quarter kilogram quantities to Flaco, Joseph Condello,* and two persons whom Perna knew as "Joe" and "Cass". (Tr. 88-98). During this time Malizia and Perna also sold John Gwynn a half kilogram of heroin for \$15,000. (Tr. 98-104, 110-23).

As previously arranged, Malizia and Perna met Pallatta, Ferraro, and "Donnie Boy" ** and discussed payment for the heroin. An extension of Malizia's and Perna's time to pay for the two kilograms was agreed upon, and over the next several days Malizia and Perna collected moneys from their customers and paid Pallatta and his partners \$40,000 in cash. (Tr. 126-28; 131-36; 144-47; 153).

C. Malizia and Perna Meet Lucas—The Million Dollar Customer.

In April 1973 Malizia and Perna found other customers for their heroin—St. Julian Harrison and Frank Lucas. A William Chapman, a/k/a "Chappy" intro-

* Perna had previously introduced Malizia as "Harry" to Condello in the Evergreen Bar in Brooklyn. (Tr. 61).

** "Donnie Boy" is charged in this case as Dominic Tufaro. He is currently a fugitive.

duced St. Julian Harrison to Perna and Malizia, and Harrison agreed to buy from them three kilograms of heroin for \$84,000. (Tr. 137-141).^{*} Malizia and Perna went back to their supplier Pallatta and purchased an additional four kilograms which were delivered to them by Ferraro. After diluting the heroin, Malizia and Perna delivered three kilograms to Harrison. (Tr. 142-52). Since Harrison was unable to pay for this heroin, Harrison introduced Malizia and Perna to Lucas who agreed to assume Harrison's liability and to purchase all the heroin they could supply, but only if the price, and possibly the quality, were better. Lucas specifically agreed to pay for the three kilograms Harrison had bought at \$28,000 per kilogram, and after negotiating with Malizia agreed to buy more heroin at \$25,000 per kilogram. (Tr. 157-62).

Several days later, Lucas ordered more heroin and gave Malizia and Perna \$56,000 in cash in part payment for the previously purchased three kilograms, and Malizia and Perna later gave this \$56,000 to Pallatta, Magnano, Tufaro, and Ferraro. At this meeting, Malizia ordered six more kilograms of heroin and asked Pallatta's group for a reduction on the price. (Tr. 174-83). Thereafter Ferraro delivered another six kilograms of heroin from Pallatta's group to Malizia and Perna. (Tr. 190-92). After diluting the heroin with manita in their stash apartment, Malizia and Perna sold five of these kilograms to Lucas for \$125,000.^{**} (Tr. 192-93).

^{*} Harrison and Chapman were charged as defendants in this indictment. Harrison's case was severed on consent, and the jury in the October 1975 trial was unable to reach a verdict as to Chapman.

^{**} By this time Malizia and Perna had moved the "stash" apartment to another location at Westerwelt Avenue in the Bronx. (Tr. 192).

During the period of April 1973 through the beginning of August 1973, Malizia and Perna delivered approximately 35-50 additional kilograms of heroin to Lucas for which he paid them approximately \$800,000 in cash. (Tr. 194-96).^{*} In addition, Malizia was in charge of keeping lists that indicated the various amounts of money their customers owed the Malizia-Perna partnership. (Tr. 200, 849-50; GX 2, 3, 4). Perna and Malizia had obtained this heroin from Pallatta, Magnano and Tufaro, for approximately \$600,000. (Tr. 199-201). Thus Malizia and Perna made a \$200,000 profit.

D. Verzino Joins the Malizia and Perna Partnership and They Purchase Five Kilograms of Pure Heroin from DeLutro.

In September, 1973, Verzino, who recently had been released from Atlanta Federal Penitentiary, joined the existing Perna-Malizia partnership at Malizia's request. Verzino stated that he knew Malizia's suppliers—the Pallatta group—and would talk to them about a price reduction. (Tr. 211-19, 822-24, 830-32). Thereafter Verzino obtained new heroin customers and began selling heroin and other drugs to Malizia's and Perna's regular customers—Lucas, Gwynn and others. (Tr. 222-25, 835-44, 850-52).^{**}

^{*} During this April to August period, Perna and Malizia were delivering regularly to Gwynn and others additional heroin which they obtained from Pallatta, Magnano and Tufaro. (Tr. 183-84).

^{**} When Verzino was introduced to Gwynn by Malizia and Perna in October, 1973, Gwynn handed Malizia \$15,000, which Malizia entered in his tally sheet. Gwynn then offered to sell Malizia pure cocaine at a price of \$25,000 per kilogram, but Malizia and Verzino complained that the price was too steep. Later, on two occasions, Verzino collected from Gwynn money owed for narcotics. (Tr. 851-54).

Early in November, 1973, Verzino met with DeLutro, whom he had known for years, at Raymond's Restaurant in Manhattan.* DeLutro told Verzino that the price of heroin was high at that time, anywhere from \$50,000 up to \$60,000 per kilogram. Verzino then met with Perna and Malizia, and they agreed that Verzino should try to purchase pure heroin from DeLutro for up to \$50,000 per kilogram, because even at that price they were better off than they were purchasing diluted heroin from Pallata's group. Thereafter, Verzino met DeLutro at Raymond's, and after some bargaining, Verzino and DeLutro agreed that DeLutro would sell Verzino five kilograms of pure heroin for \$250,000. (Tr. 876-82).

Malizia, Perna and Verzino raised \$234,000 in cash from their customers in order to buy the heroin from DeLutro. After DeLutro received the \$234,000, he delivered the five kilograms of heroin to Verzino, Malizia and Perna. Later that night, Malizia, Perna and Verzino discovered that DeLutro had given them eight ounces less than the five kilograms. After Malizia confronted DeLutro with the fact that he had shortchanged Malizia's group, DeLutro agreed to make it up with the next sale. (Tr. 240-50, 882-903).

E. Malizia and His Partners Order Additional Heroin from the Pallatta Organization.

Subsequent to the DeLutro delivery of pure heroin, Malizia, Perna and Verzino attempted to buy pure heroin from Pallatta and Magnano. Since the Pallatta and Magnano group did not have pure heroin, Malizia ordered 15 to 20 kilograms of diluted heroin from them. Ferraro, the deliveryman for Pallatta and Magnano, delivered twelve kilograms of diluted heroin to Perna. Perna and Malizia sold ten of these kilograms to Lucas. (Tr. 251-63, 905-10).

* DeLutro was also known as "Tony West." (Tr. 876).

F. Malizia Is Arrested and a Coded Telephone List of His Customers Is Seized.

On December 18, 1973 Malizia was arrested by agents of the Drug Enforcement Administration. At the time of his arrest, Malizia had in his possession a driver's license under the name of Harry Luppess (GX 1B)* and a coded list of phone numbers, which included Perna's, Lucas' and Gwynn's home phone numbers.** (Tr. 689, 693, 743-44, 761-62, 864, 872; GX 1).

After Malizia's arrest,*** Perna or Verzino went to Malizia's apartment in Riverdale and obtained some papers and records which Malizia kept in detailing the various customers, the amounts of money owed, and the drugs received from and moneys owed to the Pallatta-Magnano group. (Tr. 275-83, 914-17, 921-30; GX 2, 3, 4).****

* Verzino testified that on different occasions Malizia had lent him a driver's license under the name of Harry Luppess. (Tr. 864).

** GX 1 lists a series of numbers with writing next to each set. When the numbers listed are reversed in order and one digit is added to each, the true telephone number is revealed.

*** Following Malizia's arrest, Verzino and Perna met with Lucas at the Van Cortland Motel. Verzino told Lucas that Lucas was behind in his payments and that they needed money to pay the many expenses they had incurred since Malizia's arrest. Verzino then offered to sell Lucas a kilogram of pure heroin for \$110,000. Lucas agreed to purchase approximately 3-4 ounces of pure heroin as a sample. Perna later informed Verzino that he had given the pure heroin to Lucas. (Tr. 930-35).

**** GX 2 was Malizia's master tally sheet which included the various customers' names as "JQJ" for Gwynn, "Cass" for Cassanova, "Pee" for Pee Wee, and others with notations indicating the amount of money owed and goods sold. In addition, GX 2 had references to Pallatta under the initials "FB," Frank Bolot. (Tr. 921-27).

G. The Partnership Continues after Malizia's Arrest.

Malizia's narcotics partnership did not end with Malizia's arrest. Following his arrest, Malizia had a number of telephone conversations in code with Verzino and asked if Verzino had collected the money Lucas, Gwynn and the other customers owed. Verzino advised Malizia that he was in the process of contacting some of the customers and that some of the customers claimed they did not owe Perna or Malizia money. (Tr. 315-16, 967-68).

Perna's relationship with Verzino began to deteriorate after Malizia's arrest. According to Perna, Verzino was drinking excessively, alienating narcotics customers, and talking loudly in public places about their narcotics business. On January 7, 1974, Perna went to the Steak and Brew Restaurant in Ft. Lee, New Jersey, where he met with Condello and a person known as "Jimmy". Perna had sold heroin to Condello three or four times previously in Jimmy's presence. Condello had introduced Jimmy to Perna as Condello's partner. Perna was unaware that Condello was now cooperating with the federal authorities and wearing a recording device, and that "Jimmy" was Special Agent James Bradley of the Drug Enforcement Administration. ("DEA"). During a conversation between Perna and Condello, which took place outside the presence of Special Agent Bradley but which was recorded and introduced in evidence (GX 26B), Perna asked Condello to kill Verzino. Perna expressed concern that Verzino may plan to eliminate him from the narcotics partnership and that Verzino was a threat to Perna's safety. Perna also stated that since "Harry's" arrest Verzino was not doing what he was supposed to do with respect to the business and was not keeping his obligations to "Harry," one of which was to give some

money to "Harry's" wife.* Condello agreed to kill Verzino; a few days later Perna gave Condello and undercover agent Bradley a shotgun and a pistol for this purpose. (Tr. 286-94, 306, 696-713; GX 26, 26A, 26B).

Notwithstanding his desire to kill Verzino, Perna joined Verzino in late January 1974 to purchase three kilograms of pure heroin from Anthony Soldano for \$150,000. The genesis of this transaction goes back to the early winter of 1973, before Malizia's arrest. At that time, Malizia and Perna met with Malizia's brother, defendant Joseph Malizia,** and defendant Frank Caravella. At that time, Joseph Malizia asked if he could join the Malizia-Perna-Verzino partnership. Malizia said that would be difficult, but the partnership would buy any narcotics Joseph Malizia could obtain. Malizia suggested one possible source, and Joseph Malizia agreed to see that source and also someone else he knew. Malizia told Joseph Malizia to get in touch with Caravella or Verzino if he located any narcotics. (Tr. 311-12, 944-46). Thus, in January 1974 Joseph Malizia introduced Verzino to Soldano in Jimmy's Backyard, a bar-restaurant, in Long Island where Soldano agreed to sell three kilograms of pure heroin for \$150,000. On the day of delivery, Verzino gave Soldano \$75,000 on the account of the \$150,000 purchase price and the balance was paid to Joseph Malizia by Verzino and Caravella when he became partners with Verzino after Perna's arrest in February 1974. (Tr. 308-15, 328-33, 946-66).

* Malizia had been introduced to Condello under the name of "Harry" in early 1973, see *infra* at page 5.

** Joseph Malizia was also known as "Patsy Pontiac". He is currently a fugitive.

H. Perna Is Arrested and Meets Malizia and Lucas in Jail.

On February 1, 1974, Perna was arrested in New Jersey by federal authorities. At the time of his arrest, Perna had in his possession eight kilograms of diluted heroin which he had planned to deliver to Condello and Bradley. The arresting officer also seized from Perna a list of telephone numbers (GX 6), and a piece of paper listing his heroin customers, moneys owed him, and his own debts for heroin transactions (GX 5).^{*} Included on the phone number list were Lucas' and Gwynn's current telephone numbers. (Tr. 333-41, 342-51; GX 5, 6).

While in jail, Perna and Malizia discussed the money owed the narcotics partnership and Verzino's attempts to collect those debts. (Tr. 355-64).^{**} Some time later, in

^{*} Perna's narcotics worksheet (GX 5) reads as follows:

"Frank	3.10
Gun	9
Ida	31.
R.R.	
Coco	5.
Q	28.
Chino	8.5
Big J	10.
Pee W	
Luck	
Skinny	18.8
Cas	18.5
Cockeye	13.
Owe F.B.	333."

Perna testified that the notation "Frank—3.10" meant that Lucas owed \$310,000 and "Q—28." meant that Gwynn owed him \$28,000. Perna also testified that the notation "Owe F. B. 33." meant that he owed Pallatta, who he knew as "Frank Bolot" \$333,000 for heroin previously purchased. (Tr. 341-346).

^{**} During this time Malizia and Perna made a telephone call to Gwynn and both discussed with Gwynn the debt of approximately \$30,000 he owed the partnership. (Tr. 361-64).

May or June 1973, Malizia and Perna were joined by Lucas at the federal detention center. Perna asked Lucas for the \$310,000 which he owed Perna, Malizia and Verzino. After negotiating, Malizia agreed to lower the debt to \$275,000 and Lucas told Perna and Malizia he would make certain they received their money but that he would not be able to pay the entire sum at one time. Lucas said he would make arrangements with his attorney, Gino Galina,* to give them \$50,000 as a first payment and thereafter to pay the balance in \$50,000 installments. Malizia met with Galina in the interview room at the jail, and Galina told him that Lucas had given him only \$25,000 for Perna and Malizia instead of the promised \$50,000. (Tr. 364-70).

In July, 1974 when no additional money had been received from Lucas, Perna and Malizia met Galina in the interview room at the jail. Galina said he had seen Lucas several times, and Lucas had said he would deliver the money, but had not done so. Malizia asked Galina if it were possible to liquidate Lucas' assets. Galina said that this was beyond his power unless Lucas agreed. (Tr. 374-79). Malizia then proposed to pay Galina 10% of the first \$100,000 and 5% of the balance if Galina would help the Malizia partnership obtain the money owed to them by Lucas. (Tr. 374-79).**

* Galina was named as an un-indicted co-conspirator. He was murdered in November, 1977.

** On January 28, 1975, Lucas was arrested again in his residence at 933 Sheffield Road, Teaneck, New Jersey. Agents of the Drug Enforcement Administration, pursuant to a search warrant seized approximately \$584,000 in cash (GX 42) from the residence, approximately 150 clear plastic bags in a suitcase (GX 43), and a heat sealing machine. (Tr. 1099-1114).

I. Verzino Is Arrested and Begins to Cooperate.

On February 25, 1974, Verzino and Caravella were arrested in front of 1130 Pelham Parkway in the Bronx. Subsequent to their arrests they were taken to apartment 4J at that address, which Verzino was then using as a stash for narcotics, where the arresting officers seized approximately 26 pounds of heroin which Verzino, Perna and Malizia had gotten from Pallatta, Magnano, Bolella, DeLutro and Soldano. At the time of his arrest Verzino had in his possession a telephone book which contained the telephone numbers of Gwynn, DeLutro, Bolella and Malizia under the nickname "Lord Nelson". (Tr. 984-92; GX 18). Verzino also identified a paper seized from his person as a narcotics customer list indicating the amounts of money owed this partnership and by whom. (GX 13). There was one entry for Lucas as "MOOSE-3.10" reflecting that Lucas owed \$310,000; and another entry was "QUINN-4" reflecting that Gwynn owed \$4,000 at the time of Verzino's arrest. (Tr. 972-81, 1090-96; GX 13).^{*} Following his arrest Verzino agreed to cooperate with the Government.

J. Malizia and Perna Escape from Jail.

In August 1974, Malizia and Perna learned that Verzino was cooperating with the authorities. The two decided to escape from jail with other individuals, one of whom was named Barrerra. In planning the escape, Barrerra offered Malizia and Perna 200 kilograms of

^{*} Law enforcement officers seized from Caravella at the time of his arrest a paper which the Government contended was identical with Verzino's customer list, except that it did not reflect an entry for "MOOSE" as Verzino's did; the paper found on Caravella did, however, have an entry "gynn-4" which the Government contended corresponded to the \$4,000 Gwynn debt shown on Verzino's paper. (Tr. 1090-93; GX 22).

heroin if their escape was successful. Malizia and Perna agreed that upon receipt of the heroin it would be sold to Lucas. Consequently, on September 22, 1974, Malizia, Perna, Barrerra and four others escaped from the detention center at West Street New York, New York. A short time later Perna was arrested and began to cooperate with the authorities. (Tr. 384-93, 1002). Malizia was not apprehended until February 1977 in Miami, Florida.

The Defendant's Case

Malizia did not testify in his own behalf. He called John Gwynn who testified that he never had any narcotics dealings or conversations with Malizia.* Gwynn, a convicted felon for first degree manslaughter, testified that in 1973 he met with Perna and Malizia in his apartment at 1065 Jerome Avenue in the Bronx where Perna asked him to sell some heroin. During this conversation, according to Gwynn, Malizia was in the bathroom. Gwynn stated that he refused to become involved because he was tired of prison life and when Perna became angry, Malizia suggested that Perna leave the apartment. Gwynn also testified that he met Perna and Malizia again, and that in 1973 he met Perna and Verzino. (Tr. 1156-60).

On cross-examination Gwynn admitted that in his 1975 trial in which he was convicted for conspiracy and distribution of heroin, he testified in his own behalf that in 1973 he had a conversation with both Perna and Malizia at which time Perna asked Gwynn if he wanted

* Prior to Gwynn's testifying the Government agreed not to bring out the fact that Malizia first met Gwynn in New York State prison at Greenhaven when Gwynn was serving a sentence for his conviction for first degree manslaughter. (Tr. 1130-31). Malizia at that time in the 1960's was serving a ten year sentence after his state conviction for possession of narcotics.

to get into the narcotics business, but that he refused the request. (Tr. 1168-69).

ARGUMENT

POINT I

The District Court Properly Denied Malizia's Motions To Discharge Counsel and to Represent Himself.

Malizia contends that the District Court improperly denied his motion to proceed to trial *pro se* and to discharge his court appointed attorney. Since Malizia's request to represent himself was not made until the trial had commenced and the request was far from an unequivocal demand to represent himself without the assistance of an attorney, the District Court properly denied the motion to proceed *pro se*.

On April 19, 1977, the scheduled date of trial and before the jury was empaneled, Malizia presented motion papers seeking the recusal of Judge Cooper and the dismissal of his Court appointed attorney.* When Judge Cooper, outside the presence of the jury panel, asked Malizia if he wanted to say anything in support of his motion papers, the defendant responded: "I want to submit the papers. . . . That is all."** (Tr. 4-5). The

* At a pre-trial conference on March 8, 1977, Malizia asked the District Court to appoint an attorney to represent him. On March 15, 1977 Judge Cooper appointed Joseph I. Stone, Esq. to represent Malizia.

** The essence of Malizia's motion rested on the unsupported allegation that Judge Cooper and his attorney engaged in unlawful plea bargaining. (Tr. 2-3; 8; Court Exhibit 1). This Court has rejected that claim. See, *In re Ernest Malizia*, Dkt. No. 77-3025 (2d

[Footnote continued on following page]

District Court denied the motion and proceeded to select a jury. Later that same day, Malizia, through his attorney, asked for the appointment of another attorney to file an appeal from Judge Cooper's denial of Malizia's recusal motion, and his motion to dismiss his attorney. (Tr. 8-10). This motion was denied, and the District Court continued to select and swear in the jury.

On April 20, 1977, Malizia filed motion papers in the Court of Appeals seeking an order of mandamus to recuse Judge Cooper. (Tr. 33; Court Exhibit 2). Opening statements were made and the Government began to present its evidence. On April 26, 1977, while the trial was in its fourth day, this Court denied from the bench Malizia's petition to recuse Judge Cooper. *In re Ernest Malizia*, Dkt. No. 77-3025, (2d Cir., April 26, 1977). That same day and after denial of his petition, Malizia for the first time moved under *Faretta v. California*, 422 U.S. 806 (1975), "to represent himself with the assistance of counsel," whom he later identified as Harold Konigsberg, a non-lawyer, and fellow inmate at the Metropolitan Correctional Center with a long history of disruptive court

Cir., April 26, 1977). In addition, Malizia claimed that his court appointed attorney was inadequately representing him since he refused to subpoena witnesses on behalf of the defendant and that he refused to request certain tape recordings from the Government. (Court Exhibit 1). Both claims, of course, are unsupported by the record. The Government prior to and during the trial made full and complete discovery to defense counsel who in effect stated that he could not imagine a case where an attorney came into court and knew more of the Government's case than he knew in the instant case. (Tr. 15-25). Indeed Malizia and his attorney had access to the testimony of the two main witnesses against Malizia—Perna and Verzino. Both Perna and Verzino testified at length in the 1975 trial of Malizia's co-conspirators. Moreover, the Government offered Malizia the opportunity to inspect all of the 3500 material and exhibits in the case. To this offer Malizia responded that he wanted to do it in the Metropolitan Correctional Center. (Tr. 28-29, 33-35).

activity. See *United States ex rel. Konigsberg v. Vincent*, 526 F.2d 131 (2d Cir. 1975). (Tr. 518; 536-545; 552).

After conducting an extensive hearing the District Court denied Malizia's application and ordered the trial to continue with Malizia's court appointed counsel. (Tr. 518-58). Following his conviction Malizia's retained counsel filed a new trial motion claiming that the District Court had erred in denying the defendant the right to proceed *pro se*. In that motion Malizia conceded that he first made the motion to represent himself on April 26, 1977—almost one week after the trial had commenced. Judge Cooper denied the new trial motion. (App. 38). On appeal Malizia argues for the first time that he made his motion to proceed *pro se* before commencement of trial on April 19, 1977.

A. Malizia Failed to Move Pretrial to Represent Himself.

The law is well settled that a defendant may voluntarily and intelligently elect to defend himself. *Faretta v. California*, 422 U.S. 806 (1975); *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942); 28 U.S.C. § 1654. This Court has held in *Sapienza v. Vincent*, 534 F.2d 1007, 1010 (2d Cir. 1976) that the Supreme Court's decision in *Faretta v. California*, *supra*, did not alter the rule in this circuit that "[o]nce the trial has begun with the defendant represented by counsel, his right thereafter to discharge his lawyer, and to represent himself is sharply curtailed." *United States ex rel. Maldonado v. Denno*, 348 F.2d 12, 15 (2d Cir. 1965), *cert. denied sub nom. DiBlasi v. McMann*, 384 U.S. 1007 (1966). See also *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972).

Malizia seeks to avoid the impact of these cases by arguing that his motion made on the day of trial to disqualify Judge Cooper and to discharge his court appointed

counsel constituted a timely motion to represent himself at trial. A review of the record clearly shows that the first time Malizia asserted his right to defend himself *pro se* occurred on April 26, 1977, when the trial was well into its fourth day. (Tr. 508-21). Malizia's actions on the first day of trial and prior to the selection of a jury simply cannot be construed as an adequate attempt to inform the Court of his desire to defend himself at trial.

Prior to the selection of a jury Malizia presented the District Court with a recusal motion and a motion to discharge his court appointed counsel. (App. 26-30). After receiving the papers, the Court had an extended colloquy with Malizia and his attorney. (Tr. 1-24). At no time did Malizia inform the Court of any desire to represent himself at the trial. While Malizia vigorously explained his desire to disqualify Judge Cooper and to discharge his court appointed counsel, he never stated any inclination to try the case *pro se*. The absence of any such statement is particularly noteworthy when we consider that Malizia was not a timid defendant unwilling and unable to express his views to the Court.

In a futile attempt to resurrect a *pro se* claim, Malizia for the first time on appeal suggests that he made his *pro se* motion *before* the commencement of trial on April 19, 1977 when he wrote in his motion to recuse Judge Cooper and discharge his attorney that he was acting "in propria persona". Relying on this delicate linguistic claim, Malizia argues that the District Court's failure to construe this motion as a request to proceed *pro se* warrants reversal of his conviction. Malizia's failure to advance this argument before the District Court in his post trial motions not only constitutes a waiver of the point, but demonstrates that the entire argument that prior to trial he exercised his right to proceed *pro se* is a mere afterthought. *United States v. Fuentes*, Dkt. No. 77-1083, slip op. 5883 (2d Cir. 1977); *United States v.*

Braunig, 553 F.2d 777, 780-81 (2d Cir. 1977), *cert. denied*, 45 U.S.L.W. 370 (June 6, 1977); *United States v. Araujo*, 539 F.2d 287, 290-91 (2d Cir. 1976).

At no time before, during, or after sentence did Malizia argue that he had made his motion to proceed *pro se* prior to the inception of trial. Indeed in the post trial motions filed by the attorney *retained* by Malizia after the trial, but before the imposition of sentence, the claim was never made that Malizia expressed his desire to proceed *pro se* on April 19, 1977, the day the trial began; rather the contention was simply that on April 26, 1977 Malizia made his *pro se* motion.*

Moreover, the language Malizia now claims demonstrated his election to represent himself at trial simply meant that the instant motion to dismiss his court appointed counsel was being brought "in propria persona," or in one's own proper person. In the motion filed on the day of trial Malizia wrote the following:

"Further also it will be requested by the defendant acting in propria persona that his attorney of record be likely be entirely dismissed from participating any further in my defense." (App. 26).

The thrust of this statement was the obvious—that in making the motion to dismiss counsel the defendant was

* Counsel was retained by Malizia on May 25, 1977, and on May 31, 1977, the scheduled date for sentence, he requested additional time to become familiar with all of the proceedings. Judge Cooper granted the request and sentence was re-scheduled for June 15, 1977. After sentencing, on June 15, 1977, counsel asked for an additional seven days to file his post-trial motions. This, too, was granted by the Trial Court. When counsel filed his affidavit on behalf of Malizia's post-trial motion on this very point, paragraph 12 of counsel's affidavit referred to the transcript of April 26, 1977 as the basis for the claim that Malizia had elected to proceed *pro se*.

acting on his own, and not with the advice of counsel. In view of Malizia's failure to inform the District Court of his unequivocal desire to defend himself despite numerous colloquies with the court, Judge Cooper can hardly be faulted for failing to interpret the above quoted language as a demand by Malizia to proceed *pro se* with the actual trial. The difference between filing a motion "in one's own proper person" to discharge an attorney, and asserting the right to defend himself against serious criminal charges without the assistance of an attorney is substantial.*

Finally, Malizia's conduct after the filing of the motion to discharge his attorney demonstrates further that his April 19, 1977 motions were not intended as an election to defend himself at trial. For example, immediately after Judge Cooper denied Malizia's motions for recusal of the District Court and discharge of counsel on April 19, 1977, Malizia specifically asked through his attorney that the court appoint another attorney to file an appeal. (Tr. 8-10). Moreover, in his petition to this Court filed during the trial, Malizia requested that he be allowed to represent himself *with* the assistance of other counsel. (See Petition for Permanent Injunction Order, *In re Ernest Malizia*, Dkt. No. 77-3025 (2d Cir. April 26, 1977)). Courts have consistently rejected the right of a defendant to "hybrid" representation—that is *pro se*

* The Government believes that Malizia's actions prior to the selection of the jury cannot be reasonably construed as a demand to proceed to trial without the assistance of counsel. We believe it doubtful whether a District Court must permit a defendant to proceed *pro se* when the request is made on the day of trial; the defendant had ample opportunity to make the request at an earlier time, and granting the request might necessitate a continuance. A court's schedule and the scarce resources of the criminal justice system should not be at the peril of a defendant who at the last possible moment decides to exercise his right to represent himself at trial.

representation and representation by an attorney. See, e.g., *United States v. Wolfish*, 525 F.2d 457 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976); *United States v. Hill*, 526 F.2d 1019 (10th Cir. 1975); *cert. denied*, 425 U.S. 940 (1976); *United States v. Swinton*, 400 F. Supp. 805 (S.D.N.Y. 1975).

B. The District Court Properly Denied Malizia's Tardy Motion to Represent Himself.

It was not until the fourth day of trial, on April 26, 1977, that Malizia first informed Judge Cooper of his desire to represent himself, and even that request was equivocal. On the morning of April 26, 1977 Malizia interrupted the court proceedings to state that he objected "on the basis of *Ferrera versus California*" and that "I'll go on my own." (Tr. 512, 518). He repeated the words *Ferrera v. California* or *Ferrera v. United States*. (Tr. 518, 520). Malizia's attorney suggested that the court conduct an inquiry to determine if Malizia wanted to waive counsel and to permit him to proceed *pro se*. (Tr. 528-29). The District Court conducted a lengthy inquiry, and after patiently listening to the defendant's tirade denied his extraordinarily tardy request to discharge his attorney and to proceed *pro se*. (Tr. 536-58).

The District Court's decision not to permit the discharge of court appointed counsel and to allow Malizia to proceed *pro se* was eminently correct. A defendant does not have an unqualified right to substitution of appointed counsel; see, e.g., *Avery v. Alabama*, 308 U.S. 444 (1940); *Maynard v. Meachum*, 545 F.2d 273 (1st Cir. 1976), *United States v. Young*, 482 F.2d 993 (5th Cir. 1973); *United States v. Calabro*, 467 F.2d 973 (2d Cir.), *cert. denied*, 410 U.S. 926 (1972); *United States v. White*, 429 F.2d 711 (D.C. Cir. 1970); and, if a defendant should wish to dismiss his attorney and represent himself during the course of a trial, his right is but a

qualified one, subject to the discretion of the trial judge. *Sapienza v. Vincent*, *supra*; *United States v. Dougherty*, *supra*; *United States ex rel, Maldonado v. Denno*, *supra*. This has been a long standing and firmly entrenched rule in the federal courts, *see, e.g., United States v. Catino*, 403 F.2d 491 (2d Cir. 1968), *cert. denied sub nom. Pagano v. United States*, 394 U.S. 1003 (1969); *United States v. Bentvena*, 319 F.2d 916 (2d Cir.), *cert. denied sub nom. Mirra v. United States*, 375 U.S. 940 (1963); and, it has *not* been altered by the Supreme Court's decision in *Faretta v. California*. *Sapienza v. Vincent*, *supra*, 534 F.2d at 1010. Factors that have been held relevant for determination of a *pro se* application include the motivation underlying the request and the performance of current counsel. *Sapienza v. Vincent*, *supra*.

In accordance with procedures established by this Court in *United States v. Plattner*, 330 F.2d 271, 276 (2d Cir. 1964), the District Court conducted an examination of the defendant with a view towards fully understanding Malizia's background, education and employment experience (Tr. 546-47), and to provide Malizia with a full opportunity to make the necessary showing of good cause for dismissal of his attorney. (Tr. 548-52). This, Malizia utterly failed to do. The *new* "offer of proof" presented by Malizia to support his argument that defense counsel's conduct was detrimental to his defense consisted of outrageous, unwarranted and unsubstantiated conclusions.* The essence of the charge leveled at counsel was that he had "conspired and worked against his clients and potential clients as an undercover agent for the narcotics authority." (Tr. 518). This allegation is so fanciful that Judge Cooper properly and wisely characterized it as "defamation [which] should be avoided as

* On appeal Malizia has not explained *how* defense counsel prejudiced his defense.

the plague" (Tr. 558); and, we submit, merits no further comment other than to observe that defense counsel was an experienced and able criminal attorney. Moreover, at no time, either before or during or after trial did Malizia show that there existed any conflict of interest relating to defense counsel's representation of Malizia,* or that the continued representation resulted in an apparently unjust verdict. *United States v. Calabro*, *supra* at 986.

After conducting the hearing, the District Court in denying his motion, made the following findings: 1) Malizia was ignorant and incapable of conducting his own defense without causing serious harm to himself; 2) Malizia's conduct throughout the trial had been deliberately disruptive; 3) the attempted dismissal of Mr. Stone was merely a tactic to manipulate the record for purposes of appeal; and 4) Mr. Stone's ability and conduct in representing Malizia had been outstanding. (Tr. 553-57).

The District Court's hearing was thorough and its conclusions inevitably correct regarding both the mid-trial *pro se* motion and the demand for substitution of counsel. Judge Cooper, present in the courtroom and aware of the nuances which a cold record cannot convey concluded that Malizia was engaged in a calculated effort to create some kind of error and to confuse the record. Indeed, it is abundantly clear even from the cold transcript that from the outset of the proceedings Malizia had embarked on a course of provocative antics obviously attempting to either obtain a mistrial or to disrupt the orderly process of the

* On March 30, 1977, the District Court conducted a thorough hearing to determine whether Mr. Stone's prior representation of Anthony Verzino in 1965 precluded counsel from providing Malizia with proper and adequate representation. During the extensive hearing, Malizia indicated that he was satisfied with Mr. Stone's representation. (Minutes of Pre Trial Conference, *United States v. Malizia*, 3/30/77, at p. 13).

administration of the District Court's calendar, and above all, to disrupt the courtroom atmosphere in which his guilt or innocence was soberly and fairly tested. In view of Malizia's disruptive attitude throughout the trial Judge Cooper had no choice but to deny the mid-trial motion to discharge the court appointed counsel and to permit Malizia to proceed *pro se*. Any other decision would have fueled Malizia's clear intent to disrupt the orderly and fair administration of justice.*

* From the beginning of trial and specifically Perna's and Verzino's testimony, the Government's main witnesses, Malizia interrupted and abused and ridiculed them. (Tr. 121, 316, 821, 836, 842, 844). Malizia, also, continually baited Judge Cooper and his rulings during the whole trial (Tr. 14; 18; 21-24; 156; 371; 406-412; 503-504; 508-512; 535; 590-594; 636-637; 939-940; 1044; 1065) made various comments on the evidence (Tr. 921; 993; 1093; 1100); took exhibits out of the courtroom without permission (Tr. 798-799); demanded personal secretarial supplies from the Trial Court (Tr. 1065); and, at one time, boldly told the Trial Court that he would "continue the same nonsense" and speak when he wanted to. (Tr. 590-591). On another occasion he threatened his appointed counsel. (Tr. 559-564). In addition, Malizia's conduct reached the level of reprehensible conduct that Judge Cooper ordered the Marshals to take the defendant out of the courtroom on at least four separate occasions. (Tr. 508-12; 518-21; 586; 679-80). Finally, in what must appear as a last desperate attempt to create error, Malizia savagely attacked his counsel. (Tr. 1130-35). Malizia was later convicted for this assault and this Court affirmed that conviction. *United States v. Malizia*, Dkt. No. 77-1295 (2d Cir., Nov. 9, 1977).

W. also hasten to add that Malizia requested that *all* of the seven defendants convicted in the 1975 trial, Gerard Cachoian and Miguel Russo be brought to New York, from various federal institutions to testify in the defendant's case. The District Court complied with this request. Only Gwynn testified; the others, after an *ex parte* hearing pursuant to Rule 17(b), Fed.R.Cr.P., refused to testify on Fifth Amendment grounds. (Tr. 640-667; 716-733; 805-807, 1149-52). In addition, during the course of the trial Malizia demanded that an additional nine witnesses, all in federal custody, be brought via appropriate writs to New York to testify in the defendant's case. This request was properly denied. (Tr. 370, 566-76).

Moreover, a review of the proceedings of April 26, 1977 also demonstrates that Malizia's *pro se* request was not an unequivocal expression of his desire to proceed *pro se*, but was a demand to substitute appointed counsel with Harold Konigsberg, a fellow prisoner of Malizia's, and to allow Malizia to represent himself with the assistance of Konigsberg. During the lengthy colloquy between the Court and Malizia, Malizia asked Judge Cooper to allow Konigsberg to assist him. (Tr. 518, 536-39, 545, 552).*

The District Court could properly refuse a request to proceed *pro se* when it appears that the defendant wants to have the assistance of counsel and to represent himself. See *Ennis v. Le Vre*, Dkt. No. 76-2155, slip op. 5205, 5211 (2d Cir., Aug. 9, 1977); *United States v. Cyrphers*, 556 F.2d 630 (2d Cir. 1977); *United States v. Wolfish*, 525 F.2d 457 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976). *A fortiori*, the District Court was not required to permit Malizia to appear *pro se* with Konisberg, a non lawyer well known for his own disruptive activity.**

* Malizia stated: "I want Harold Konisberg (sic) to assist me. This is a challenge to the Court. This is your ball field and the way I see it is two against one, so now we will put it on a two to two basis". (Tr. 545). Later, when asked by Judge Cooper if he had anything to say in support of his application, the following exchange occurred:

"A. I supported my application. I want to know if Mr. Harold Konisberg (sic) can represent and assist me?

Q. That application is denied. What else do you want to say in support of your application other than the statement that you have read into the record.

A. Then you would have to appoint me another assistant." (Tr. 552).

** This Court has commented on Konigsberg's own penchant for courtroom disorders. As Judge Feinberg stated in *United States ex rel. Konigsberg v. Vincent*, 526 F.2d 131, 134 (2d Cir. 1975):

"He [Konigsberg] continued to use counsel the judge had

[Footnote continued on following page]

Faced with an obviously disruptive defendant intent on manipulating his rights to adequate representation of counsel and to proceed *pro se*, Judge Cooper properly denied a motion made during the fourth day of trial to discharge defense counsel and to permit the defendant to represent himself with the assistance of a non-lawyer, Harold Konigsberg. Indeed to prevent Malizia from further disrupting the trial Judge Cooper had no choice but to deny the motion.

POINT II

The District Court Properly Denied Defendant's New Trial Motion Based on Selective Prosecution.

Malizia contends that the District Court erred in denying his new trial motion based on selective prosecution. The defendant claimed for the first time in his post trial motions that he was the subject of selective prosecution because in his case the Government violated a Department of Justice policy not to prosecute an individual on charges where there has been a prior disposition of the same basic charges in a state court proceeding. For a multitude of reasons Judge Cooper's denial of Malizia's motions for a hearing and new trial based on this claim was correct.

made available to him and at the same time engaged in disruptive, self-serving conduct which would not have been tolerated from an attorney."

Certainly Judge Cooper did not have to permit Malizia to manipulate the selection of counsel so as to permit Konigsberg's to disrupt Malizia's trial.

In an effort to support his motion for a new trial, Malizia sought only a hearing to determine a) whether the Government had a policy *not* to prosecute an individual on charges where there had been a prior disposition in a state jurisdiction concerning similar facts or circumstances and, b) if it had such a policy whether it was violated. The Government in a response affidavit by the Assistant United States Attorney explained the nature of the Department of Justice policy, and showed how the Government had complied with that policy.* The Department of Justice guideline specifically permits the United States Attorney to obtain the Attorney General's approval for the dual prosecution after the federal prosecution occurs. The uncontradicted affidavit of the Assistant United States Attorney makes clear that in August 1977 the Attorney General approved the federal prosecution of Malizia; such *nunc pro tunc* approval complies fully with the Department of Justice policy. (See Affidavit of Assistant United States Attorney in Opposition to Defendant's Post Trial Motions, dated August 8, 1977).

Moreover, even if the Government had violated this particular Department of Justice policy Malizia would not be entitled to a new trial based on selective prosecution. The law in this Circuit is quite clear that the defendant making a selective prosecution claim,

* The policy is as follows:

"No Federal case should be tried when there has been a state prosecution for substantially the same act or acts without a recommendation having been made to the Assistant Attorney General demonstrating compelling Federal interests for prosecution. No such recommendation may be approved by the Assistant Attorney General without having it first brought to attention of the Attorney General. . . . Note that approval of the action of the United States Attorney subsequent to the dual prosecution constitutes compliance." *United States Attorney's Manual*, 9-2.142 (1-10-77). (App. 41).

"bears the heavy burden of establishing, at least *prima facie*, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights."

United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974). See also *United States v. King*, Dkt. No. 77-1221 slip op. 65, 71 (2d Cir., Oct. 7, 1977). Malizia has made no claim that he was singled out for prosecution because of his race, religion, or to prevent him from exercising his constitutional rights. Furthermore, it is frivolous in the extreme to suggest that Malizia has been singled out for prosecution in that the Government normally would not prosecute an individual who sold substantial quantities of heroin.*

Finally, the claim of selective prosecution should have been raised in a pretrial motion. Rule 12(b) F. R. Crim.

* Indeed even if the Government had violated this policy, Malizia cannot benefit because the policy does not create a legal defense for an accused. See *United States v. Hutul*, 416 F.2d 607, 627-27 (7th Cir. 1969), *cert. denied*, 396 U. S. 1007 (1970). Cases such as *Rinaldi v. United States*, 46 USLW 299, 3304 (November 8, 1977), (*per curiam*) are simply not relevant. There the Supreme Court held that the District Court had abused its discretion in refusing to grant the Government's motion to dismiss when the Government violated the multiple prosecution policy, and the violation resulted from prosecutorial misconduct rather than from inadvertence. In the instant case the Government complied with the policy, there is no evidence of misconduct, and the Government vigorously seeks to maintain the judgment of conviction.

P. Indeed Malizia's appellate counsel recognized this point when he stated the following to Judge Cooper at the time of Malizia's sentencing:

"... I am not raising this [claim of selective prosecution] as a legal argument at all, Your Honor, because there was no pretrial motion made in selective enforcement, no issue made . . . as to the propriety of this prosecution, and further I haven't seen the memorandum so I don't know the scope of it." (Sentencing Minutes, June 15, 1977 at p. 7).

In sum the Government concurs with the assertion in Malizia's brief that the Government sought to "finally remove Malizia from society because of his past . . ." (Br. 20). Contrary to the suggestion in Malizia's brief that such action by the Government was wrong, we believe the prosecution of Malizia in this case was well justified precisely because of his past conduct. In view of Malizia's past activity involving the selling of substantial quantities of heroin in complete disregard for the law and the misery his actions inflicted on others, failure to prosecute would have been a dereliction of the Government's responsibilities to the community.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
 Southern District of New York,
 Attorney for the United States
 of America.*

FEDERICO E. VIRELLA, JR.,
 RICHARD D. WEINBERG,
*Assistant United States Attorneys,
 Of Counsel.*

AFFIDAVIT OF MAILING

State of New York)

County of New York)

ss.:

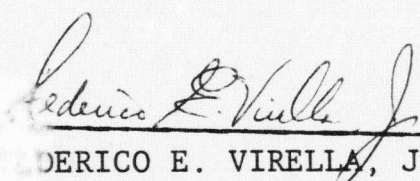
FEDERICO E. VIRELLA, JR. being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 15th day of December, 1977
he served ~~a copy of the~~ within attached brief
two 2 copies
by placing the same in a properly postpaid franked
envelope addressed:

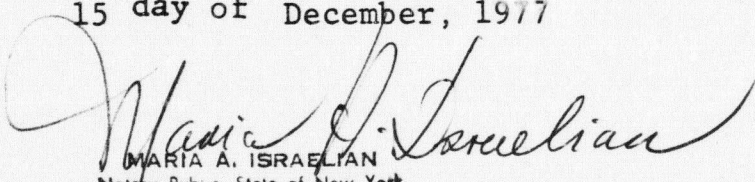
J. Jeffrey Weisenfeld, Esq.
401 Broadway
New York, New York 10013

And deponent further says that he sealed the said
envelope and placed the same in the mail box for mailing
at One St. Andrew's Plaza, Borough of Manhattan, City of
New York.

Sworn to before me this


FEDERICO E. VIRELLA, JR.

15 day of December, 1977


MARIA A. ISRAELIAN
Notary Public, State of New York
No. 31-4521851
Qualified in New York County
Term Expires March 30, 1978

